Supreme Court, U.S.
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No. 06-339

Supreme Court of the United States

HARRY M. KATZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner Harry M. Katz, M.D., was convicted by a jury for prescribing Schedule III and IV controlled substances to patients presenting symptoms for which the prescriptions were indicated under § 334.106 R.S.Mo. (2006). The conviction was based in part on expert testimony that a reasonable person would have investigated the patients further to determine whether the prescriptions were within or outside of the scope of medical practice and for a legitimate medical purpose under state law as construed by the federal government. A "willful blindness" instruction was given over specific objection by counsel.

1.) Did the "willful blindness" instruction allow the jury to infer that petitioner deliberately avoided knowledge on the basis of evidence that, at best, only supported the inference that a reasonable person in the situation would have deliberately avoided knowledge thereby allowing petitioner's conviction in the Eighth Circuit, in violation of the laws of the District of Columbia and Second and Seventh Circuits?

2.) Did evidence which established, at best, "recklessness" or "malpractice" by petitioner satisfy the beyond a reasonable doubt standard for proof of "intent" to violate the federal drug laws under the Fifth Amendment?

3.) Was petitioner's conviction in violation of *Gonzales v. Oregon*, 126 S. Ct. 904; 163 L. Ed. 2d 748; 2006 U.S. LEXIS 767 (2006)?

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Eighth Circuit.

More specifically, the Petitioner Harry M. Katz and the Respondent United States of America are the only parties. Neither party is a company, corporation, or subsidiary of any company or corporation.

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PETITION FOR A WRIT OF CERTIORARI

Harry M. Katz, the Petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above entitled case on 5-9-06.

OPINIONS BELOW

The 5-9-06 opinion of the Court of Appeals for the Eighth Circuit, whose judgment is herein sought to be reviewed, is reported at 2006 U.S. App. LEXIS 11462 and is reprinted in the separate Appendix A to this Petition.

A petition for rehearing was timely filed and was denied by the Court of Appeals for the Eighth Circuit on 6-15-06. This opinion is an unpublished decision, and is reprinted in the separate Appendix C to this Petition.

The prior opinion and judgment (Judgment & Commitment Order) of the United States District Court for the Eastern District Of Missouri, entered on 6-30-05, is an unpublished decision, and is reprinted in the separate Appendix B to this Petition.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on 5-9-06. A petition for rehearing was timely filed and was denied by the Court of Appeals for the Eighth Circuit on 6-15-06. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in relevant part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury... nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law ... *Id.*

21 U.S.C. § 841 provides in relevant part:

> (a) Unlawful acts Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally -
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance...*Id.* 21 U.S.C. § 841.

§ 334.106 R.S.Mo. (2006) provides in relevant part:

> § 334.106. Intractable pain treatment physician may prescribe controlled substances for therapeutic purposes, requirements--exceptions
>
> 1. **Notwithstanding any other provision of law to the contrary, a physician may prescribe, administer or dispense controlled substances for a therapeutic purpose to a person diagnosed and treated by a physician for a condition resulting in intractable pain, if such diagnosis and**

treatment has been documented in the physician's medical records. No physician shall be subject to disciplinary action by the board solely for prescribing, administering or dispensing controlled substances when prescribed, administered or dispensed for a therapeutic purpose for a person diagnosed and treated by a physician for a condition resulting in intractable pain, if such diagnosis and treatment has been documented in the physician's medical records.

2. The provisions of subsection 1 of this section shall not apply to those persons being treated by a physician for chemical dependency because of their use of controlled substances not related to the therapeutic purposes of treatment of intractable pain.

3. The provisions of subsection 1 of this section provide no authority to a physician to prescribe, administer or dispense controlled substances to a person the physician knows or should know to be using controlled substances which use is not related to the therapeutic purpose.

4. **Drug dependency or the possibility of drug dependency in and of itself is not a reason to withhold or prohibit the prescribing, administering or dispensing of controlled substances for the therapeutic purpose of treatment of a person for intractable pain, nor shall dependency relating solely to such prescribing, administering or dispensing subject a physician to disciplinary action by the board.** *Id.* HISTORY: L. 1995 S.B. 125 § 334.106 subsecs. 1 to 4 (emphasis added)

STATEMENT OF THE CASE

On or about 5-27-04 Harry M. Katz was charged with violation of 21 U.S.C. § 846, 21 U.S.C. § 841(a)(1), 18 U.S.C. § 2 (while "a registrant authorized to dispense controlled substances, executed a scheme with the intent to dispense controlled substances by writing prescriptions outside the scope of the usual course of professional practice and not for a legitimate medical purpose; and committed a substantial step in furtherance thereof.") (Count 1); 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 846 (while "a registrant authorized to dispense controlled substances, did knowingly and intentionally attempt to cause to be dispensed a quantity of Alprazolam, a Schedule IV Controlled Substance drug, outside the course of professional practice and not for a legitimate medical purpose; and committed a substantial step in furtherance thereof.") (Counts 2-6, 8, 10-12, 14); 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 846 (while "a registrant authorized to dispense controlled substances, did knowingly and intentionally attempt to cause to be dispensed a quantity of Acetaminophen with Codeine, a Schedule III Controlled Substance drug, outside the course of professional practice and not for a legitimate medical purpose") (Counts 7, 9); 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 846 (while "a registrant authorized to dispense controlled substances, did knowingly and intentionally attempt to cause to be dispensed a quantity of Diazapam, a Schedule IV Controlled Substance drug, outside the course of professional practice and not for a legitimate medical purpose; and committed a substantial step in furtherance thereof.") (Count 13); 21 U.S.C. § 853 (forfeiture) (Count 15).

These charges arose from federal allegations that Dr. Katz had prescribed Schedule III and IV controlled substances to several patients outside the course of professional practice and not for a legitimate medical purpose as the federal government construed the State of Missouri laws and ethical rules. In particular, the charges arose based

on prescriptions that had been written for fifteen people, including three 3 undercover police.

He was arraigned on or about 6-22-04 at which time he pleaded not guilty to the charged violations.

On or about 12-9-04, Harry M. Katz was charged in a second superseding indictment. This indictment dismissed the original Count 1 alleging a 'scheme' and added pleaded violation of 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 846 (while "a registrant authorized to dispense controlled substances, did knowingly and intentionally attempt to cause to be distributed a quantity of Alprazolam, a Schedule IV Controlled Substance drug, outside the course of professional practice and not for a legitimate medical purpose; and committed a substantial step in furtherance thereof.") (Counts 1-5); 21 U.S.C. § 841(a)(1) (while "a registrant authorized to dispense controlled substances, did knowingly and intentionally caused to be distributed a quantity of Alprazolam, a Schedule IV Controlled Substance drug, outside the course of professional practice and not for a legitimate medical purpose") (Counts 33-34, 36, 38, 40, 42, 188, 190, 192); 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 846 (while "a registrant authorized to dispense controlled substances, did knowingly and intentionally attempt to cause to be distributed a quantity of Diazapam, a Schedule IV Controlled Substance drug, outside the course of professional practice and not for a legitimate medical purpose; and committed a substantial step in furtherance thereof.") (Count 6); 21 U.S.C. § 841(a)(1) (while "a registrant authorized to dispense controlled substances, did knowingly and intentionally caused to be distributed a quantity of Diazapam, a Schedule IV Controlled Substance drug, outside the course of professional practice and not for a legitimate medical purpose") (Counts 9, 12, 14, 16, 18, 20, 96, 98, 100, 102, 104, 106, 108, 111, 112, 114, 116, 118, 120, 122, 124, 126, 128, 130, 132, 134, 136, 138, 140, 142-148, 150-187); 21 U.S.C. § 841(a)(1) (while "a registrant authorized to dispense controlled substances, did knowingly and intentionally

caused to be distributed a quantity of Propoxyphene, a Schedule IV Controlled Substance drug, outside the course of professional practice and not for a legitimate medical purpose") (Counts 13, 15, 23, 25, 27, 29, 31, 35, 37, 39, 41, 43, 97, 99, 101, 103, 105, 107, 109, 110, 113, 115, 117, 119, 121, 123, 125, 127, 129, 131, 133, 135, 137, 139, 141, 189, 191); 21 U.S.C. § 841(a)(1) (while "a registrant authorized to dispense controlled substances, did knowingly and intentionally caused to be distributed a quantity of Hydrocodone, a Schedule III Controlled Substance drug, outside the course of professional practice and not for a legitimate medical purpose") (Counts 7-8, 10-11, 17, 19, 21, 44-95, 149); 21 U.S.C. § 841(a)(1) (while "a registrant authorized to dispense controlled substances, did knowingly and intentionally caused to be distributed a quantity of Lorazepam, a Schedule IV Controlled Substance drug, outside the course of professional practice and not for a legitimate medical purpose") (Counts 22, 24, 26, 28, 30); 21 U.S.C. § 841(a)(1) (while "a registrant authorized to dispense controlled substances, did knowingly and intentionally caused to be distributed a quantity of Acetaminophen with Codeine, a Schedule III Controlled Substance drug, outside the course of professional practice and not for a legitimate medical purpose") (Count 32); 21 U.S.C. § 853 (forfeiture) (Count 193).

He was rearraigned on or about 12-15-04 at which time he again pleaded not guilty to the charged violations.

Dr. Katz proceeded to trial.

At trial, the government introduced the testimony of the individuals, including the undercover police, who had been charged in the indictment as having received prescriptions from Dr. Katz. They testified that they had visited him at his office, had presented symptoms of need for treatment, had received basic medical examinations, and had received the prescriptions alleged in the indictment.

No witness, including the police, testified that they had explicitly stated to Dr. Katz that their need for the

prescriptions was outside the course of professional practice and not for a legitimate medical purpose.

The evidence relied upon by the government to persuade the jury that Dr. Katz' prescriptions were outside the course of professional practice and not for a legitimate medical purpose was primarily the testimony of a government expert, Dr. Parran.[1] His testimony was essentially that a 'reasonable person' in Dr. Katz' position would have investigated the patients' cases more closely to ascertain that the prescriptions were for a legitimate medical purpose. Dr. Parran testified that, in his opinion, the prescriptions were not for a legitimate medical reason.[2] While defense counsel objected that Dr. Parran's testimony had converted the trial into a "medical malpractice case"[3], the District Court overruled the objection and allowed the testimony.[4]

In fact, the whole thrust of the government case was that Dr. Katz' prescriptions were not for a legitimate medical purpose under Missouri law as construed by the federal government; i.e. that he committed medical malpractice by issuing the prescriptions.[5]

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[1] Transcript Trial 3-14-05, pages 26-51.

[2] *Id.* See also Transcript Trial 3-9-05, pages 101-199.

[3] Transcript Trial 3-9-05, page 128.

[4] *Id.*

[5] In fact, Dr. Katz relied upon § 334.106 R.S.Mo. (2006) in prescribing his medications. This statute provides in relevant part:

> § 334.106. Intractable pain treatment physician may prescribe controlled substances for therapeutic purposes, requirements--exceptions
>
> 1. Notwithstanding any other provision of law to the contrary, a physician may prescribe, administer or dispense controlled substances for a therapeutic purpose to a person diagnosed and treated by a physician for a condition resulting in intractable pain,

In the District Court's instructions to the jury, over specific defense objection, the court gave a "willful blindness" or "ostrich instruction"[6]. This instruction advised the jury that they could infer Dr. Katz "acted knowingly" (thereby establishing the "intent" element of the alleged crime) if the jury found that he "deliberately closed his eyes to what would otherwise have been obvious to him". While the court cautioned that "negligence, mistake, or carelessness" was insufficient to establish willful blindness, the court did not rule out "recklessness".[7]

> if such diagnosis and treatment has been documented in the physician's medical records. No physician shall be subject to disciplinary action by the board solely for prescribing, administering or dispensing controlled substances when prescribed, administered or dispensed for a therapeutic purpose for a person diagnosed and treated by a physician for a condition resulting in intractable pain, if such diagnosis and treatment has been documented in the physician's medical records...
>
> 4. Drug dependency or the possibility of drug dependency in and of itself is not a reason to withhold or prohibit the prescribing, administering or dispensing of controlled substances for the therapeutic purpose of treatment of a person for intractable pain, nor shall dependency relating solely to such prescribing, administering or dispensing subject a physician to disciplinary action by the board.

§ 334.106(1), (4) R.S.Mo. (2006)

[6] These instructions are also known as "conscious avoidance" or "deliberate ignorance" instructions.

[7] See Instruction No. 17 to the jury: "You may find that the defendant Harry Meyer Katz acted knowingly if you find beyond a reasonable doubt that defendant Katz was aware of a high probability that he caused to be dispensed controlled

As set forth above, the evidentiary basis for the willful blindness instruction was the 'reasonable person' testimony and argument of the prosecutor.

On 3-15-05, Dr. Katz was found guilty by the jury as to violation of 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 846 (while "a registrant authorized to dispense controlled substances, did knowingly and intentionally attempt to cause to be distributed a quantity of Alprazolam, a Schedule IV Controlled Substance drug, outside the course of professional practice and not for a legitimate medical purpose; and committed a substantial step in furtherance thereof.") (Counts 1-5); 21 U.S.C. § 841(a)(1) (while "a registrant authorized to dispense controlled substances, did knowingly and intentionally caused to be distributed a quantity of Alprazolam, a Schedule IV Controlled Substance drug, outside the course of professional practice and not for a legitimate medical purpose") (Counts 33-34, 36, 38, 40, 42, 188, 190, 192); 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 846 (while "a registrant authorized to dispense controlled substances, did knowingly and intentionally attempt to cause to be distributed a quantity of Diazapam, a Schedule IV Controlled Substance drug, outside the course of professional practice and not for a legitimate medical purpose; and

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substances outside the scope of professional medical practice and not for a legitimate medical purpose and that he deliberately avoided learning the truth. The element of knowledge may be inferred if the defendant deliberately closed his eyes to what would otherwise have been obvious to him. You may not find that defendant Katz acted knowingly, however, if you find that the defendant actually believed that he acted within the scope of professional practice or actually believed that there existed a legitimate medical purpose for the prescription at issue. A showing of negligence, mistake, or carelessness is not sufficient to support a finding of knowledge. (Katz Transcript Trial 3-14-05, pages 17-18)

committed a substantial step in furtherance thereof.") (Count 6); 21 U.S.C. § 841(a)(1) (while "a registrant authorized to dispense controlled substances, did knowingly and intentionally caused to be distributed a quantity of Diazapam, a Schedule IV Controlled Substance drug, outside the course of professional practice and not for a legitimate medical purpose") (Counts 96, 98, 100, 102, 104, 106, 108, 111, 112, 114, 116, 118, 120, 122, 124, 126, 128, 130, 132, 134, 136, 138, 140, 142-148, 150-160, 162-187); 21 U.S.C. § 841(a)(1) (while "a registrant authorized to dispense controlled substances, did knowingly and intentionally caused to be distributed a quantity of Propoxyphene, a Schedule IV Controlled Substance drug, outside the course of professional practice and not for a legitimate medical purpose") (Counts 23, 25, 27, 29, 31, 35, 37, 39, 41, 43, 97, 99, 101, 103, 105, 107, 109, 110, 113, 115, 117, 119, 121, 123, 125, 127, 129, 131, 133, 135, 137, 139, 141, 189, 191); 21 U.S.C. § 841(a)(1) (while "a registrant authorized to dispense controlled substances, did knowingly and intentionally caused to be distributed a quantity of Hydrocodone, a Schedule III Controlled Substance drug, outside the course of professional practice and not for a legitimate medical purpose") (Counts 44-95, 149); 21 U.S.C. § 841(a)(1) (while "a registrant authorized to dispense controlled substances, did knowingly and intentionally caused to be distributed a quantity of Lorazepam, a Schedule IV Controlled Substance drug, outside the course of professional practice and not for a legitimate medical purpose") (Counts 22, 24, 26, 28, 30); 21 U.S.C. § 841(a)(1) (while "a registrant authorized to dispense controlled substances, did knowingly and intentionally caused to be distributed a quantity of Acetaminophen with Codeine, a Schedule III Controlled Substance drug, outside the course of professional practice and not for a legitimate medical purpose") (Counts 32); 21 U.S.C. § 853 (forfeiture) (Count 193).

On 6-30-05, Dr. Katz was sentenced to 16 months incarceration plus 2 years supervised release, $75,000.00

fine, $17,600.00 special assessment, and $5,640.00 forfeiture. (Appendix B)

The judgment was entered on 6-30-05.

On 7-6-05, a Notice of Appeal was filed. On direct appeal, counsel argued, *inter alia*, that the evidence was insufficient and that the District Court erred in giving a willful blindness instruction.

On 5-9-06, the Court of Appeals denied Dr. Katz' appeal. In denying the appeal, the Court of Appeals held that the evidence was sufficient. With respect to the "willful blindness" instruction, the Court of Appeals held that this was appropriate as follows:

> 2. "Willful Blindness" Instruction
>
> Dr. Katz claims that the district court's willful blindness instruction invited the jury to convict him using negligence principles and that the district court abused its discretion in giving the instruction. Dr. Katz asserts that no evidence was adduced at trial that he intentionally avoided information that would have had a high probability of revealing any improper motives on the part of his patients. In fact, the government's expert testified that a doctor should believe his or her patients unless given a reason not [*19] to.
>
> On the other hand, the government argues that a willful blindness instruction was appropriate. The government highlights evidence showing that Dr. Katz ignored many warning signs and red flags and consciously eschewed performing the most rudimentary screening that would have revealed many of his patients' ruses. Dr. Katz sought no patient medical history and never ordered diagnostic or laboratory tests for any of the patients who testified, and he prescribed identical controlled substances to members of the same

family. He also provided patients access to controlled substances by routinely refilling 30-day prescriptions when only two weeks had expired.

"A willful blindness instruction is appropriate when the defendant asserts a lack of guilty knowledge, but the evidence supports an inference of deliberate ignorance. Ignorance is deliberate if the defendant was presented with facts that put her on notice that criminal activity was particularly likely and yet she intentionally failed to investigate those facts." United States v. Florez, 368 F.3d 1042, 1044 (8th Cir. 2004) (internal citations and quotations omitted). The evidence is sufficient to support the instruction [*20] if a reasonable jury could conclude beyond a reasonable doubt that the defendant either had actual knowledge of the illegal activity or deliberately failed to inquire about it before taking action to support it. Id. "If, in light of certain obvious facts, reasonable inferences support a finding that a defendant's failure to investigate is equivalent to 'burying one's head in the sand,' the jury may consider willful blindness as a basis for knowledge." Id. In this case, the government adduced ample evidence to support the giving of a "willful blindness" instruction, including testimony from several patient/witnesses that they obtained 30-day prescriptions for controlled substances every two weeks for several years. Accordingly, the district court did not abuse its discretion in instructing the jury on willful blindness.

United States v. Katz, 2006 U.S. App. LEXIS 11462 **18-20 (8th Cir. 5-9-06) (Appendix A)

Counsel timely filed a petition for rehearing. On 6-15-06, the Court of Appeals denied rehearing. (Appendix C)

Dr. Katz demonstrates within that (A) this Court should grant his Petition For Writ Of Certiorari to resolve a conflict among the United States courts of appeals as to when a "willful blindness" instruction is appropriate; and (B) this Court should grant his Petition For Writ Of Certiorari because the court of appeals for the Eighth Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

REASONS FOR GRANTING THE WRIT

1.) **THIS COURT SHOULD GRANT DR. KATZ' PETITION FOR WRIT OF CERTIORARI TO RESOLVE A CONFLICT AMONG THE UNITED STATES COURTS OF APPEALS AS TO WHEN A "WILLFUL BLINDNESS" INSTRUCTION IS APPROPRIATE.**

Supreme Court Rule 10 provides in relevant part as follows:

> **Rule 10.**
> **CONSIDERATIONS GOVERNING REVIEW ON WRIT OF CERTIORARI**
>
> A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> **(a)** a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision ... *Id.*

Supreme Court Rule 10(a-c).

1A.) The Federal Courts Of Appeals Are Divided As To The Evidentiary Basis Which Supports A "Willful Blindness" Instruction.

In *United States v. Carrillo*, 435 F.3d 767; 2006 U.S. App. LEXIS 2010 (7th Cir. 2006), the Court of Appeals rejected use of the "willful blindness" instruction to establish "intent" where the evidentiary basis for the instruction was that a "reasonable person" would have investigated further as to whether a crime was being committed. The Court of Appeals noted that their holding was consistent with the Second Circuit, see *United States v. Rodriguez*, 983 F.2d 455, 458 (2nd Cir. 1993) (willful blindness not use "reasonable person" standard).

In *United States v. Alston-Graves*, 369 U.S. App. D.C. 219; 435 F.3d 331; 2006 U.S. App. LEXIS 2001 (DC Cir. 2006), the District of Columbia Court of Appeals agreed that use of the objective "reasonable person" standard was improper and noted that the Courts of Appeals have found that one of the dangers of the use of the instruction under based on the reasonable person standard was a likelihood that the jury would convict based on negligence or an evidentiary basis less than "beyond a reasonable doubt". *Id.* 2006 U.S. App. LEXIS 2001 at **24 [n.9] citing *United States v. Del Aguila-Reyes*, 722 F.2d 155, 157 (5th Cir. 1983).

The *Alston-Graves* court went on to note the difficulties faced by the courts, and the widely varying, and conflicting, approaches utilized in attempting to apply the willful blindness theory of liability to criminal cases. For example, the Court of Appeals pointed out:

> Some courts hold that a willful blindness instruction should not be given unless there is evidence that the defendant "purposely contrived to avoid learning all the

facts in order to have a defense [**28] in the event of a subsequent prosecution." *United States v. Espinoza*, 244 F.3d 1234, 1242 (10th Cir. 2001) (quoting *United States v. Hanzlicek*, 187 F.3d 1228,1233 (10th Cir. 1999)) (internal quotation mark omitted); accord *United States v. Heredia*, 429 F.3d 820, 824 (9th Cir. 2005); *United States v. Puche*, 350 F.3d 1137, 1149 (11th Cir. 2003); *United States v. Willis*, 277 F.3d 1026, 1032 (8th Cir. 2002). Other circuits hold that there must be evidence "that [the defendant] was aware of a high probability [of the fact in dispute] and consciously avoided confirming that fact." *United States v. Ferrarini*, 219 F.3d 145, 154 (2nd Cir. 2000) (quoting *United States v. Rodriguez*, 983 F.2d 455, 458 (2nd Cir. 1993)) (alterations in original; internal quotation mark omitted); accord *United States v. Freeman*, 2005 U.S. App. LEXIS 29222, No. 04-30037, 2005 WL 3525612, at *5-6 (5th Cir. 2005). There are other variations, see, e.g., supra note 5[8]...

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[8] In "note 5", the Court of Appeals pointed out: "Some of the more recent decisions are: *[United States v.] Freeman*, [434 F.3d 369, 2005 U.S. App. LEXIS 29222] (5th Cir. 2005) (permitting "deliberate indifference" instruction when "(1) the defendant was subjectively aware of a high probability of the existence of illegal conduct; and (2) the defendant purposely contrived to avoid learning of the illegal conduct") (quoting *United States v. Scott*, 159 F.3d 916, 922 (5th Cir. 1998)); United States v. Heredia, 429 F.3d 820, 824 (9th Cir. 2005) ("The instruction is 'rarely appropriate,' and should be given only when the government presents 'specific evidence' that the defendant '(1) actually suspected that he or she might be involved in criminal activity, (2) deliberately avoided taking steps to confirm or deny those suspicions, and (3) did

United States v. Alston-Graves, 369 U.S. App. D.C. 219; 435 F.3d 331; 2006 U.S. App. LEXIS 2001 **(DC Cir. 2006)

The split and conflicts among the circuits is clear cut and the opposing positions are hardening instead of harmonizing.

This Court has never resolved this question which divides the Courts of Appeals and, as is apparent from the numerous published decisions, the unsettled question is a constantly recurring one which has created much uncertainty in the courts below. The outcome of litigation should not depend on the location of the court in which it occurs. These facts strongly militate for grant of certiorari. See Supreme

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so in order to provide himself or herself with a defense in the event of prosecution.'") (quoting *United States v. Baron*, 94 F.3d 1312, 1318 n.3 (9th Cir. 1996)); *[United States v.] Sdoulam*, 398 F.3d 981, 993-95 (8th Cir. 2005) ("'A deliberate ignorance instruction is appropriate when the defendant asserts a lack of guilty knowledge, but the evidence supports an inference of deliberate ignorance.'") (quoting *United States v. Hildebrand*, 152 F.3d 756, 764 (8th Cir. 1998)); *United States v. Espinoza*, 244 F.3d 1234, 1242 (10th Cir. 2001) (permitting use of "deliberate ignorance" instruction "'only when the prosecution presents evidence that the Defendant purposely contrived to avoid learning all the facts in order to have a defense in the event of a subsequent prosecution'") (quoting *United States v. Hanzlicek*, 187 F.3d 1228, 1233 (10th Cir. 1999)); *United States v. Ferrarini*, 219 F.3d 145, 154 (2nd Cir. 2000) (permitting "conscious avoidance" instruction only if: (1) "the defendant asserts the lack of some specific aspect of knowledge required for conviction," and (2) "'the evidence is such that a rational juror may reach [the] conclusion beyond a reasonable doubt . . . . that [the defendant] was aware of a high probability [of the fact in dispute] and consciously avoided confirming that fact'") (quoting *United States v. Rodriguez*, 983 F.2d 455, 458 (2nd Cir. 1993)) (alterations in original)."

Court Rule 10(a). *Montana v. Hall*, 481 U.S. 400, 406, 95 L.Ed.2d 354, 107 S.Ct. 1825 (1987); *United States v. Mendoza*, 464 U.S. 154, 78 L.Ed.2d 379, 104 S.Ct. 568 (1984); *Braxton v. United States*, 500 U.S. 344, 114 L.Ed.2d 385, 111 S.Ct. 1854 (1991); *Stinson v. United States*, 508 U.S. ___, ___, and [n.], 123 L.Ed.2d 598, 605 and [n. 2], 113 S.Ct. 1913 (1993); *Bailey v. United States*, 516 U.S. ___, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995).

1B.) The "Willful Blindness" Instruction In Petitioner's Case Allowed The Jury To Infer That Petitioner Deliberately Avoided Knowledge On The Basis Of Evidence That, At Best, Only Supported The Inference That A Reasonable Person In The Situation Would Have Deliberately Avoided Knowledge Thereby Allowing Petitioner's Conviction In The Eighth Circuit, In Violation Of The Laws Of The District Of Columbia, The Second And The Seventh Circuits.

As set forth above, the evidentiary basis for the "willful blindness" instruction in Dr. Katz' case was primarily the testimony of a government expert, Dr. Parran.[9] His testimony was essentially that a 'reasonable person' in Dr. Katz' position would have investigated the patients' cases more closely to ascertain that the prescriptions were for a legitimate medical purpose. Dr. Parran testified that, in his opinion, the prescriptions were not for a legitimate medical reason.[10]

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[9] Transcript Trial 3-14-05, pages 26-51.

[10] *Id.* See also Transcript Trial 3-9-05, pages 101-199.

This evidentiary basis would not have been allowed in the District of Columbia Circuit or the Second Circuit or the Seventh Circuit yet it was approved by the Eighth Circuit.

Since there was no overt evidence that Dr. Katz was *actually* aware that his patients did not qualify for the prescriptions under § 334.106 R.S.Mo. (2006), the error in giving the instruction cannot be harmless. *United States v. Carrillo*, 435 F.3d 767; 2006 U.S. App. LEXIS 2010 (7th Cir. 2006); *United States v. Rodriguez*, 983 F.2d 455, 458 (2nd Cir. 1993); *United States v. Alston-Graves*, 369 U.S. App. D.C. 219; 435 F.3d 331; 2006 U.S. App. LEXIS 2001 (DC Cir. 2006). The "willful blindness" instruction almost certainly contributed to the conviction of Dr. Katz.

Based on the foregoing, this Court should grant certiorari and set the case for argument as to when a "willful blindness" instruction is appropriate.

2.) THIS COURT SHOULD GRANT DR. KATZ' PETITION FOR WRIT OF CERTIORARI BECAUSE THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION

This Court has never hesitated to exercise it's power of supervision where the lower courts have substantially departed from the accepted and usual course of judicial proceedings with resulting injustice to one of the parties.

McNabb v. United States, 318 U.S. 332 (1943).[11] As the Court stated in *McNabb:*

> ... the scope of our reviewing power over convictions brought here from the federal courts is not confined to ascertainment of Constitutional validity. Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence.

McNabb, 318 U.S. at 340.

2A.) The Evidence Which Established, At Best, "Recklessness" Or "Malpractice" By Petitioner Failed To Satisfy The Beyond A Reasonable Doubt Standard For Proof Of "Intent" To Violate The Federal Drug Laws Under The Fifth Amendment.

As set forth above, at trial, the government introduced the testimony of the individuals, including the undercover police, who had been charged in the indictment as having received prescriptions from Dr. Katz. They testified that they had visited him at his office, had presented symptoms of need for treatment, had received basic medical examinations, and had received the prescriptions alleged in the indictment.

No witness, including the police, testified that they had explicitly stated to Dr. Katz that their need for the

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[11] See also *GACA v. United States*, 411 U.S. 618 (1973); *United States v. Jacobs*, 429 U.S. 909 (1976); *Rea v. United States*, 350 U.S. 214 (1956); *Benanti v. United States*, 355 U.S. 96 (1957); *United States v. Behrens*, 375 U.S. 162 (1963); *Elkins v. United States*, 364 U.S. 206 (1960)..

prescriptions was outside the course of professional practice and not for a legitimate medical purpose.

The evidence relied upon by the government to persuade the jury that Dr. Katz' prescriptions were outside the course of professional practice and not for a legitimate medical purpose was primarily the testimony of a government expert, Dr. Parran.[12] His testimony was essentially that a 'reasonable person' in Dr. Katz' position would have investigated the patients' cases more closely to ascertain that the prescriptions were for a legitimate medical purpose. Dr. Parran testified that, in his opinion, the prescriptions were not for a legitimate medical reason.[13] While defense counsel objected that Dr. Parran's testimony had converted the trial into a "medical malpractice case"[14], the District Court overruled the objection and allowed the testimony.[15]

In fact, the whole thrust of the government case was that Dr. Katz' prescriptions were not for a legitimate medical purpose under Missouri law as construed by the federal government; i.e. that he committed medical malpractice by issuing the prescriptions.

In the District Court's instructions to the jury, over specific defense objection, the court gave a "willful blindness" or "ostrich instruction". This instruction advised the jury that they could infer Dr. Katz "acted knowingly" (thereby establishing the "intent" element of the alleged crime) if the jury found that he "deliberately closed his eyes to what would otherwise have been obvious to him". While the court cautioned that "negligence, mistake, or

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[12] Transcript Trial 3-14-05, pages 26-51.

[13] *Id.* See also Transcript Trial 3-9-05, pages 101-199.

[14] Transcript Trial 3-9-05, page 128.

[15] *Id.*

carelessness" was insufficient to establish willful blindness, the court did not rule out "recklessness".[16]

As a result of the "reasonable person" evidentiary basis, the prosecutor's arguments to the jury, and the "willful blindness" instruction, the evidence against Dr. Katz did not satisfy the "beyond a reasonable doubt" standard of the Fifth Amendment to the Constitution of the United States to establish his "intent" to commit the crime. *United States v. Carrillo*, 435 F.3d 767; 2006 U.S. App. LEXIS 2010 (7th Cir. 2006); *United States v. Rodriguez*, 983 F.2d 455, 458 (2nd Cir. 1993); *United States v. Alston-Graves*, 369 U.S. App. D.C. 219; 435 F.3d 331; 2006 U.S. App. LEXIS 2001 (DC Cir. 2006).

Based on all of the foregoing, this Court should grant his Petition For Writ Of Certiorari because the court of appeals for the Eighth Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

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[16] See Instruction No. 17 to the jury: "You may find that the defendant Harry Meyer Katz acted knowingly if you find beyond a reasonable doubt that defendant Katz was aware of a high probability that he caused to be dispensed controlled substances outside the scope of professional medical practice and not for a legitimate medical purpose and that he deliberately avoided learning the truth. The element of knowledge may be inferred if the defendant deliberately closed his eyes to what would otherwise have been obvious to him. You may not find that defendant Katz acted knowingly, however, if you find that the defendant actually believed that he acted within the scope of professional practice or actually believed that there existed a legitimate medical purpose for the prescription at issue. A showing of negligence, mistake, or carelessness is not sufficient to support a finding of knowledge. (Katz Transcript Trial 3-14-05, pages 17-18)

2B.) Petitioner's Conviction Is Violative Of This Court's Decision In *Gonzales v. Oregon*, 126 S. Ct. 904 (2006).

As set forth above, the whole thrust of the government case was that Dr. Katz' prescriptions were not for a legitimate medical purpose under Missouri law as construed by the federal government; i.e. that he committed medical malpractice by issuing the prescriptions.

In fact, Dr. Katz relied upon § 334.106 R.S.Mo. (2006) in prescribing his medications. This statute provides in relevant part:

> § 334.106. Intractable pain treatment physician may prescribe controlled substances for therapeutic purposes, requirements--exceptions
>
> 1. Notwithstanding any other provision of law to the contrary, a physician may prescribe, administer or dispense controlled substances for a therapeutic purpose to a person diagnosed and treated by a physician for a condition resulting in intractable pain, if such diagnosis and treatment has been documented in the physician's medical records. No physician shall be subject to disciplinary action by the board solely for prescribing, administering or dispensing controlled substances when prescribed, administered or dispensed for a therapeutic purpose for a person diagnosed and treated by a physician for a condition resulting in intractable pain, if such diagnosis and treatment has been documented in the physician's medical records...
>
> 4. Drug dependency or the possibility of drug dependency in and of itself is not a

> reason to withhold or prohibit the prescribing, administering or dispensing of controlled substances for the therapeutic purpose of treatment of a person for intractable pain, nor shall dependency relating solely to such prescribing, administering or dispensing subject a physician to disciplinary action by the board.

§ 334.106(1), (4) R.S.Mo. (2006)

In other words, Dr. Katz' defense was that his acts and omissions, complained of by the government, were specifically allowed under § 334.106(1) R.S.Mo. (2006)

In *Gonzales v. Oregon*, 126 S. Ct. 904; 163 L. Ed. 2d 748; 2006 U.S. LEXIS 767 (2006), this Court held that the Attorney General "is not authorized to make a rule declaring illegitimate a medical standard for care and treatment of patients that is specifically authorized under state law." *Id.* 126 S. Ct. at 916. The Attorney General does not have the "authority to declare an entire class of activity outside the course of professional practice and therefore a criminal violation of the CSA ["Controlled Substances Act"]." *Id.* at 909.

Gonzales is on point with Dr. Katz' case because the Attorney General has charged and the District Court has convicted Dr. Katz for conduct which should be protected by state law; i.e. § 334.106(1) R.S.Mo. (2006).

Based on the foregoing, the decision by the Court of Appeals for the Eighth Circuit has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision. *Id. McNabb v. United States*, 318 U.S. 332 (1943); *GACA v. United States*, 411 U.S. 618 (1973); *United States v. Jacobs*, 429 U.S. 909 (1976); *Rea v. United States*, 350 U.S. 214 (1956); *Benanti v. United States*, 355 U.S. 96 (1957); *United States v. Behrens*, 375 U.S. 162 (1963); *Elkins v. United States*, 364 U.S. 206 (1960).

Based on all of the foregoing, this Court should grant certiorari and review the judgment of the Court of Appeals for the Eighth Circuit in Dr. Katz' case.

CONCLUSION

For all of the foregoing reasons, Petitioner Harry M. Katz respectfully prays that his Petition for Writ of Certiorari be **GRANTED** and the case set for argument on the merits.

Alternatively, Petitioner respectfully prays that this Court **GRANT** certiorari, **VACATE** the order affirming his direct appeal and **REMAND**[17] to the court of appeals for reconsideration in light of *Gonzales v. Oregon*, 126 S. Ct. 904; 163 L. Ed. 2d 748; 2006 U.S. LEXIS 767 (2006) and/or *United States v. Carrillo*, 435 F.3d 767; 2006 U.S. App. LEXIS 2010 (7th Cir. 2006); *United States v. Rodriguez*, 983 F.2d 455, 458 (2nd Cir. 1993); *United States v. Alston-Graves*, 369 U.S. App. D.C. 219; 435 F.3d 331; 2006 U.S. App. LEXIS 2001 (DC Cir. 2006).

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Date: _____

[17] For authority on "GVR" orders, see *Lawrence v. Chater*, 516 U.S. 163, 167-68, 133 L. Ed. 2d 545, 116 S. Ct. 604 (1996).

No.

Supreme Court of the United States

HARRY M. KATZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

APPENDIX

COMES NOW PETITIONER Harry M. Katz and submits the attached appendix pursuant to Supreme Court Rules.

Chris Kokkinakos, Esq.
Counsel for Petitioner
17600 Northland Park Ct.
Southfield, MI 48075
Phone: 248-552-8900

Date:_____

APPENDIX A

ORDER & JUDGMENT OF THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT DATED 5-9-06

United States of America, Appellee,

v.

Harry Meyer Katz, Appellant.

No. 05-2940

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

445 F.3d 1023; 2006 U.S. App. LEXIS 11462

January 13, 2006, Submitted

May 9, 2006, Filed

SUBSEQUENT HISTORY: Rehearing denied by, Rehearing, en banc, denied by United States v. Katz, 2006 U.S. App. LEXIS 14744 (8th Cir., June 15, 2006)

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Eastern District of Missouri.

CASE SUMMARY:

PROCEDURAL POSTURE: A jury found defendant guilty of 176 counts of attempted or actual distribution of Schedule III and IV controlled substances outside of the scope of medical practice and not for a legitimate medical purpose in violation of 21 U.S.C.S. §§ 846 and 841(a)(1). The United States District Court for the Eastern District of Missouri sentenced him to 16 months' imprisonment, a $75,000 fine, and forfeiture of $5,640. Defendant appealed.

OVERVIEW: Defendant raised seven grounds of alleged error, none of which survived review: (1) because sufficient evidence supported defendant's conviction, the district court did not err in failing to grant his motion for judgment of acquittal or a new trial; (2) the district court did not err in admitting evidence under Fed. R. Evid. 404(b) relating to 300 prescriptions not charged in the indictment because the evidence was relevant to show defendant's intent and its admission was not unfairly prejudicial; (3) the admission of a charged drug offender's testimony under Rule

404(b) was not an abuse of discretion because the testimony showed defendant's knowledge and intent in writing prescriptions in order to establish that he did not have a legitimate medical purpose in writing them; (4) the district court did not give erroneous jury instructions; (5) there was no abuse of discretion in allowing disputed portions of testimony from a Government expert, which was admissible under Fed. R. Evid. 704(b), to be submitted to the jury; (6) the Government's rebuttal closing argument did not deprive defendant of a fair trial; and (7) the district court did not err in failing to grant a mistrial.

OUTCOME: Defendant's conviction was affirmed.

COUNSEL: For UNITED STATES OF AMERICA, Plaintiff - Appellee: John T. Davis, Sirena M. Wissler, U.S. ATTORNEY'S OFFICE, St. Louis, MO.

For HARRY MEYER KATZ, Defendant - Appellant: Barry A. Short, Evan Z. Reid, LEWIS & RICE, St. Louis, MO.

HARRY MEYER KATZ, Defendant - Appellant, Pro se, Cedar Hill, MO.

JUDGES: Before SMITH and HANSEN, Circuit Judges, and BOGUE, n1 District Judge.

n1 The Honorable Andrew W. Bogue, United States District Judge for the District of South Dakota, sitting by designation.

OPINIONBY: SMITH

OPINION:

[*1025] SMITH, Circuit Judge.

Dr. Harry Meyer Katz was charged in a 192-count indictment with attempted or actual distribution of Schedule III and IV controlled substances outside of the scope of medical practice and not for a legitimate medical purpose in violation of 21 U.S.C. §§ 846 and 841(a)(1). Each count of the indictment related to a single prescription written by Dr. Katz for various controlled substances, including Xanax, Darvocet, Alprazolam, Vicodin, and Valium. A jury found Dr. Katz guilty on 176 counts of the indictment, and the [**2]

district court n n2 sentenced him to 16 months' imprisonment, a $ 75,000 fine, and forfeiture of $ 5,640. n n3 Dr. Katz appeals, alleging seven grounds for reversal. For the reasons set forth below, we affirm.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n2 The Honorable Donald J. Stohr, United States District Judge for the Eastern District of Missouri.

n3 The forfeiture amount represents the amount of fees that Dr. Katz earned for the office visits in connection with the counts of conviction.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

I. Facts

Dr. Katz opened what could be considered an atypical medical practice in Cedar Hill, Missouri, in 1982. Dr. Katz maintained office hours seven days a week and did not accept appointments. Dr. Katz lived in his office and was amenable to opening his doors to a patient in need at any hour. He charged a flat fee, $ 40 or $ 45, for all office visits, accepting payment in cash, check or charge; he did not accept medical insurance. Dr. Katz prescribed medications to patients upon request and was suspected of violating federal drug laws. Dr. Katz was [**3] eventually indicted based upon prescriptions he wrote for fifteen people, n n4 who all testified for the government at trial.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n4 Dr. Katz was acquitted of 15 counts relating to patients Carol and Philip Marlowe and one count relating to another patient.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

[*1026] Three of these individuals were undercover law enforcement officers sent into Dr. Katz's office, attempting to obtain a prescription for a controlled substance. Officer Mike Otten visited Dr. Katz four times, acting in an undercover capacity, and each time was equipped with an audio recording device. In each of Otten's visits, he requested a prescription for Xanax, claiming that he wanted the pills to "chill out." Dr. Katz took his blood pressure, measured his

height and weight then wrote Otten a prescription for Xanax. Otten paid Dr. Katz $ 40 in cash. Officer Dawn Molkenbur also visited Dr. Katz, acting in an undercover capacity. She too requested a prescription for Xanax, telling Dr. Katz that she had used it before for personal reasons. Dr. Katz wrote her [**4] a prescription, and Molkenbur paid Dr. Katz $ 40 in cash. Lastly, undercover Officer Cynthia Scott visited Dr. Katz, acting in an undercover capacity. Scott asked Dr. Katz for Valium, stating that she liked the way it made her feel. Dr. Katz wrote her a prescription for Diazepam (generic Valium) without conducting a medical examination. Scott paid Dr. Katz $ 40 in cash.

Daniel Seay first saw Dr. Katz in 1996. Seay testified that he suffered from back and knee pain. He also testified that he had problems with anxiety and panic attacks. Dr. Katz prescribed Seay acetaminophen with codeine for pain, Alprazolam (generic Xanax), and Propoxyphene (generic Darvocet) on his first visit to Dr. Katz's office. Dr. Katz wrote Seay over 82 prescriptions for controlled substances during the course of his treatment.

Charles Beck told Dr. Katz that he wanted medication and specifically asked for Hydrocodone (generic Vicodin), which he was immediately prescribed. Beck continued to visit Dr. Katz between 1999 and 2002, complaining of various injuries and anxiety. During this time, Dr. Katz wrote Beck a total of 117 prescriptions for controlled substances. On one occasion, Dr. Katz wrote Beck a prescription [**5] for Vicodin 9 days after he gave Beck a prescription for 30 Vicodin tablets. On another occasion, Dr. Katz wrote Beck a prescription for Vicodin 6 days after he gave Beck a prescription for 30 Vicodin tablets. On a third occasion, Dr. Katz wrote Beck a prescription for Vicodin 7 days after he gave Beck a prescription for 30 Vicodin tablets. Dr. Katz then expressed concern that Beck had a problem with Vicodin abuse, but Dr. Katz continued to prescribe it for him.

Pamela Asher went to see Dr. Katz after a car accident. She told Dr. Katz that she needed medication, and

he gave her prescriptions for Darvocet and Diazepam. Pamela Asher pretended to need medication and succeeded in getting Dr. Katz to see her every 2 weeks for 3 years, during which time she received at least 82 prescriptions for Diazepam and Darvocet. Chad Asher, Pamela's husband, first saw Dr. Katz in 1998. Chad claimed that he was having stress and anxiety and a back problem. He specifically asked Dr. Katz for Diazepam and Darvocet. Chad continued to see Dr. Katz every two weeks for the next four years. On occasion, Chad would see Dr. Katz more frequently than every 2 weeks, each time receiving a new 30-day prescription. [**6] While seeing Dr. Katz, the Ashers each received the same prescriptions for the same medications.

Dan Bowen, Jr. saw Dr. Katz for several years. Initially, Bowen talked to Dr. Katz about stress and anxiety, resulting from his father's death. Dr. Katz prescribed Xanax. Bowen also told Dr. Katz that he fell on ice and hurt his back and that he suffered from recurrent headaches. Dr. Katz prescribed Hydrocodone for the back pain and Valium for the headaches. Dr. Katz wrote Bowen a total of 51 prescriptions for controlled substances. Peggy [*1027] Sue Bowen, Dan's wife, saw Dr. Katz for four to five years. She complained of migraine headaches. Dr. Katz initially prescribed Vicodin, but the prescription was later changed to Fioricet and Valium. Over time, Dr. Katz wrote her 49 prescriptions for Valium. Angie Luechtmann, daughter of the Bowens, began receiving Diazepam prescriptions from Dr. Katz in 2001. She told Dr. Katz that she was under stress because she left her husband and her brother was in jail. She also received Fioricet prescriptions from Dr. Katz. Dr. Katz was aware that Luechtmann was a methamphetamine user, but he continued to write at least 25 prescriptions for Diazepam. Dan Bowen [**7] III, son of the Bowens, began seeing Dr. Katz in 1999, complaining of stress, and received at least 25 prescriptions for Diazepam.

Danny Turman began seeing Dr. Katz when his surgeon refused to give him any more pain pills after a knee

replacement. Turman told Dr. Katz that he had pain in his knee from the knee replacement. Dr. Katz wrote Turman a prescription for Darvocet. Turman saw Dr. Katz every two weeks for a year and a half. During that time, Dr. Katz wrote Turman at least 50 prescriptions for Darvocet and 50 for Lorazepam.

William Bradley, a college student, told Dr. Katz that he had school stress and requested a prescription for Xanax. He actually intended to use the Xanax for personal pleasure. On one occasion, Bradley told Dr. Katz that he injured himself and requested pain medication. Dr. Katz, without conducting an examination of the purported injury, prescribed Darvocet.

Maria Taca gave testimony under Federal Rule of Evidence 404(b) because her prescriptions were not charged in the indictment. At the time of trial, Taca was indicted as a part of a heroine conspiracy and was testifying against Dr. Katz in hopes of receiving a lighter [**8] sentence in connection with her own case. She testified that she began seeing Dr. Katz in 1999 to obtain Xanax. Dr. Katz prescribed Xanax and Darvocet. Taca visited Dr. Katz at least every two weeks for about three years. Sometimes, she would use an assumed name and get additional prescriptions. During one visit, Dr. Katz told her that if she combined Soma and Librax together, they would produce the same effect as Xanax. Dr. Katz then gave her Soma and Librax prescriptions.

Each patient/witness testified that Dr. Katz required no paperwork at their initial visit. Further, Dr. Katz never asked for medical or family history. There were usually no physical examinations conducted, and Dr. Katz never referred any of these patients to a specialist or for a second opinion. All of the patient/witnesses paid Dr. Katz in cash and did not receive a receipt.

The government offered the expert testimony of Dr. Ted Parran. Dr. Parran gave the jury an overview of the doctor-patient relationship in general. Dr. Parran then addressed his review of Dr. Katz's patient charts for Charles

Beck, Daniel Seay, Chad Asher and Pamela Asher. Dr. Parran testified that the prescriptions written for these four [**9] patients were outside of the scope of legitimate medical practice and without a legitimate medical purpose.

II. Discussion

Dr. Katz advances the following arguments on appeal: (1) the district court erred in failing to grant his motion for judgment of acquittal or a new trial based on the sufficiency of the evidence; (2) the district court erred in admitting evidence relating to prescriptions not charged in the indictment; (3) the district court erred in admitting the testimony of Maria Taca pursuant to Rule 404(b); (4) the district [*1028] court gave erroneous jury instructions; (5) the district court erred in allowing disputed portions of testimony from the government's expert, Dr. Parran, to be submitted to the jury; (6) the government's rebuttal closing argument deprived him of a fair trial; and (7) the district court erred in failing to grant a mistrial following the inappropriate testimony of Chad Asher.

A. Sufficiency of the Evidence

A prosecution under § 841 requires

> proof beyond a reasonable doubt that the doctor was acting outside the bounds of professional medical practice, as his authority to prescribe controlled substances was being used not for treatment [**10] of a patient, but for the purpose of assisting another in the maintenance of a drug habit or of dispensing controlled substances for other than a legitimate medical purpose, i.e. the personal profit of the physician.

United States v. Tran Trong Cuong, 18 F.3d 1132, 1137 (4th Cir. 1994).

Dr. Katz contends that the record contained no evidence specific to 169 of the counts and insufficient evidence supports the remaining 7 counts of conviction. Dr. Katz maintains that the government relied upon inadmissible

evidence calculated to mislead the jury into convicting him based on a medical malpractice standard of negligence. Specifically, Dr. Katz argues he was prejudiced by the government's lumping together all of the prescriptions written for a particular patient, which tended to negate the presumptive legality attached to each prescription. Further, Dr. Katz argues that the government must prove the doctor-patient relationship for each alleged illegal prescription. According to Dr. Katz, evidence not connected directly to the writing of a charged prescription should have been considered irrelevant. Lastly, Katz points out that the government's expert opined as [**11] to the contents of only four patient records.

"This court reviews the sufficiency of the evidence de novo, viewing the evidence in the light most favorable to the government, with all reasonable inferences and credibility determinations made in support of the jury's verdict." United States v. Kelly, 436 F.3d 992, 996 (8th Cir. 2006). We hold that sufficient evidence supports Dr. Katz's conviction. The 192 prescriptions charged in the indictment represented 192 individual prescriptions written to 15 individuals who visited Dr. Katz. Each of these 15 individual patients testified at trial. The district court admitted all 192 prescriptions into evidence. Each patient testified as to their relationship with Dr. Katz and answered questions regarding their office visits with Dr. Katz. Each patient identified the prescriptions written for them by Dr. Katz and verified that they received the prescriptions from Dr. Katz. Thus, viewing the evidence in a light most favorable to the government, we consider it sufficient to support Dr. Katz's conviction.

Dr. Katz cites Tran Trong Cuong, 18 F.3d at 1132, in support of his sufficiency argument. However, Tran [**12] Trong Cuong is distinguishable, as that court based its holding of evidence insufficiency on the high percentage of counts that lacked patients to testify at trial. 18 F.3d at 1143. No patient testified as to 80 of the 136 counts in the indictment. Id. The court held that "[a] defendant is entitled

to individual consideration of every count in an indictment by the jury and evidence sufficient to convict on each count beyond a reasonable doubt, if he is to be convicted." Id. at 1142. In this case, every patient who received a prescription charged in the indictment testified, enabling the jury to consider each individual count in the indictment. For those reasons, we affirm [*1029] the district court's denial of Dr. Katz's motion for judgment of acquittal or for a new trial.

B. Admission of Evidence under Rule 404(b)

"We review the admissibility of evidence under Rule 404(b) for abuse of discretion. The district court had broad discretion in admitting such evidence and will be reversed only if 'such evidence clearly had no bearing on the case and was introduced solely to prove the defendant's propensity to commit criminal acts.'" United States v. Voegtlin, 437 F.3d 741, 745 (8th Cir. 2006) [**13] (quoting United States v. Thomas, 398 F.3d 1058, 1062 (8th Cir. 2005)) (internal citation omitted). "Rule 404(b) provides that evidence of prior crimes or acts, while inadmissible to prove that a person acted in conformity with the prior act, may be admissible for other purposes, such as 'proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.'" Id. (quoting Fed. R. Evid. 404(b)). Evidence is admissible under Rule 404(b) if it is (1) relevant to a material issue, (2) similar in kind and close in time to the crime charged, (3) proven by a preponderance of the evidence, and (4) if the potential prejudice does not substantially outweigh its probative value. Id. (quoting Thomas, 398 F.3d at 1062).

1. Admission of Prescriptions Not Charged in the Indictment

The government introduced evidence of at least 300 prescriptions that were not charged in the indictment but were written for patients who testified at trial. Dr. Katz argues that the mere fact that a prescription was written is not proof of wrongdoing. Dr. Katz asserts that the government introduced [**14] the uncharged prescriptions only to impress upon the jury the number of prescriptions that he

wrote. The government, in response, contends that the prescriptions were relevant and admissible under Rule 404(b) as proof of knowledge and intent. The district court agreed and stated that the

non-indicted prescriptions written to individuals named in the indictment appear relevant to the inquiry as to whether defendant had knowledge or intent to prescribe controlled substances to those individuals outside of the normal course of professional practice and without a legitimate medical purpose . . . the issuance of non-indicted prescriptions to the 'patients in question' does bear on defendant's treatment of those patients and is properly admitted under Rule 404(b).

We find no abuse of discretion in the district court's ruling. First, evidence is admissible under Rule 404(b) to show intent. In this case, a necessary element of the crime charged was whether Dr. Katz wrote the prescriptions for a legitimate medical purpose. Thus, the question of Dr. Katz's intent was central to the case and relevant to a material issue. Second, the prescriptions not charged in the indictment were [**15] similar in kind and close in time to the crime charged. Third, the prescriptions not charged in the indictment were proven by a preponderance of the evidence, as the patients to whom they were written testified that they did indeed receive the prescriptions from Dr. Katz. Lastly, the admission of these other prescriptions was not unfairly prejudicial. For those reasons, the district court did not abuse its discretion in admitting the prescriptions not charged in the indictment under Rule 404(b). See United States v. Green, 428 F.3d 1131, 1134 (8th Cir. 2005) (holding that the defendant's substantial rights were not affected when the district court allowed nine victims to testify who were not specifically referenced in the indictment).

[*1030] 2. Admission of Testimony from Maria Taca

Dr. Katz argues that the district court abused its discretion in admitting the testimony of Maria Taca under Rule 404(b). He contends that the admission of Taca's

testimony was intended solely to establish criminal propensity and tie him to a "drug smuggler." Dr. Katz submits that the prejudicial impact of Taca's testimony unquestionably outweighed what little probative value that it had. [**16] We find no abuse of discretion in the district court's ruling on the admission Taca's testimony under Rule 404(b). Taca's testimony was admitted to show Dr. Katz's knowledge and intent in writing these prescriptions in order to establish that he did not have a legitimate medical purpose in writing them.

Moreover, the testimony satisfies the four-factor test for the admissibility of Rule 404(b) evidence. The testimony was relevant to the material issue--whether Dr. Katz wrote these prescriptions outside the usual course of medical practice and without a legitimate medical purpose. The government established by a preponderance of the evidence that Dr. Katz wrote the prescriptions for Taca. The potential prejudice did not substantially outweigh its probative value, and the other acts were similar in kind and close in time to the crime charged. Therefore, the district court did not abuse its discretion in admitting the testimony of Maria Taca.

C. Jury Instructions

"We review the district court's jury instructions for abuse of discretion, and this court will affirm if the instructions, taken as a whole, fairly and adequately submitted the issues to the jury. A district court has [**17] broad discretion in instructing the jury, and jury instructions do not need to be technically perfect or even a model of clarity." United States v. Garcia-Gonon, 433 F.3d 587, 591 (8th Cir. 2006) (internal citations and quotations omitted).

1. Rule 404(b) Instruction

Dr. Katz alleges that the district court gave a highly confusing instruction that did not tell the jurors how to properly consider the evidence admitted under Rule 404(b). The district court gave the following jury instruction for consideration of Rule 404(b) evidence:

You have heard evidence that the defendant, Harry Meyer Katz, previously committed acts similar to the ones charged in this case. You may not use this evidence to decide whether defendant Katz carried out the acts involved in the crimes charged here. However, if you are convinced beyond a reasonable doubt, based on other evidence introduced, that defendant Katz did carry out the acts involved in the crimes charged here, then you may use this evidence concerning previous acts to decide whether he knowingly and intentionally distributed controlled substances without a legitimate medical purpose and outside the scope of professional [**18] practice.

Remember, even if you find that defendant Katz may have committed a similar act in the past, this is not evidence that he committed such an act in this case. You may not convict a person simply because you believe he may have committed similar acts in the past. Defendant Katz is on trial only for the crimes charged, and you may consider the evidence of prior acts only on the issue of intent and knowledge.

After review of this jury instruction, we find Dr. Katz's argument without merit. The instruction, as given by the district court, fairly and adequately submitted the issue to the jury and was not confusing.

[*1031] 2. "Willful Blindness" Instruction

Dr. Katz claims that the district court's willful blindness instruction invited the jury to convict him using negligence principles and that the district court abused its discretion in giving the instruction. Dr. Katz asserts that no evidence was adduced at trial that he intentionally avoided information that would have had a high probability of revealing any improper motives on the part of his patients. In fact, the government's expert testified that a doctor should believe his or her patients unless given a reason not [**19] to.

On the other hand, the government argues that a willful blindness instruction was appropriate. The

government highlights evidence showing that Dr. Katz ignored many warning signs and red flags and consciously eschewed performing the most rudimentary screening that would have revealed many of his patients' ruses. Dr. Katz sought no patient medical history and never ordered diagnostic or laboratory tests for any of the patients who testified, and he prescribed identical controlled substances to members of the same family. He also provided patients access to controlled substances by routinely refilling 30-day prescriptions when only two weeks had expired.

"A willful blindness instruction is appropriate when the defendant asserts a lack of guilty knowledge, but the evidence supports an inference of deliberate ignorance. Ignorance is deliberate if the defendant was presented with facts that put her on notice that criminal activity was particularly likely and yet she intentionally failed to investigate those facts." United States v. Florez, 368 F.3d 1042, 1044 (8th Cir. 2004) (internal citations and quotations omitted). The evidence is sufficient to support the instruction [**20] if a reasonable jury could conclude beyond a reasonable doubt that the defendant either had actual knowledge of the illegal activity or deliberately failed to inquire about it before taking action to support it. Id. "If, in light of certain obvious facts, reasonable inferences support a finding that a defendant's failure to investigate is equivalent to 'burying one's head in the sand,' the jury may consider willful blindness as a basis for knowledge." Id. In this case, the government adduced ample evidence to support the giving of a "willful blindness" instruction, including testimony from several patient/witnesses that they obtained 30-day prescriptions for controlled substances every two weeks for several years. Accordingly, the district court did not abuse its discretion in instructing the jury on willful blindness.

D. Expert Testimony

Dr. Katz urges that under Federal Rule of Evidence 704(b), Dr. Parran, the government's expert witness, should

not have been allowed to testify regarding Dr. Katz's mental state under the subjective prong of the test for criminal liability under § 846. Dr. Parran testified at length regarding his opinions [**21] of the standard of care to be followed by physicians in treating persons suffering from pain or anxiety. Dr. Parran also testified, after reviewing the medical records of four of Dr. Katz's patients, that the prescriptions written for these patients "[did] not appear to have been for a legitimate purpose." Dr. Katz further contends that the district court erred in allowing Dr. Parran to testify that a doctor who did not follow the standards of care in diagnosis could not have a legitimate medical purpose to write a prescription. Dr. Katz claims that Dr. Parran's testimony, in effect, lowered the government's burden of proof to a mere negligence standard, giving the jury license to convict him if it found his prescription methodology differed from Dr. Parran's methodology.

"We review the district court's evidentiary rulings for abuse of discretion." [*1032] United States v. Urbina, 431 F.3d 305, 311 (8th Cir. 2005). Upon review, we find Dr. Katz's argument unpersuasive. First, Rule 704(b) "prohibits experts from stating an opinion as to whether the defendant had the requisite mental state for the crime charged . . . ." Id. However, Dr. Parran did not testify regarding [**22] the subjective mental state of Dr. Katz upon writing the prescriptions charged in the indictment. In fact, during cross-examination of Dr. Parran, defense counsel asked Dr. Parran on three occasions whether he was purporting to express an opinion as to what Dr. Katz might have had in his mind at the time that he wrote the prescriptions at issue in the indictment. Each time that he was asked, Dr. Parran denied doing so. The district court's admission of this testimony did not run afoul of Rule 704(b).

Second, Dr. Parran's testimony tying standards of care to the existence of a legitimate medical purpose to write a prescription was admissible. "[A] court can allow opinion testimony if the expert's specialized knowledge is helpful to

the jury to understand the evidence or determine a fact in issue, even if the opinion embraces an ultimate issue to be decided by the jury." Id. (quoting United States v. Brown, 110 F.3d 605, 610 (8th Cir. 1997) (internal quotations omitted). Lastly, the government's burden of proof was not lowered to a negligence standard after Dr. Parran's testimony. The district court instructed the jury that they must find beyond a reasonable doubt [**23] that Dr. Katz wrote prescriptions outside the scope of medical practice and not for a legitimate medical purpose. Further, the jury was specifically instructed that mere negligence could not support a conviction for criminal conduct. As a result, the district court did not abuse its discretion in admitting Dr. Parran's expert testimony.

E. Prosecutorial Misconduct

Dr. Katz states that it was improper for the Assistant United States Attorney ("AUSA"), in his rebuttal closing argument, to compare him, unfavorably, to "a rogue's gallery of notorious drug criminals while extensively lauding the agents of the Drug Enforcement Administration." n5 According [*1033] to Dr. Katz, upon his objection, the district court merely said "let's get back on track" and let the government resume its "harangue." Dr. Katz suggests that the AUSA improperly attempted to pander to African-American jurors by comparing him to heroine pushers that victimized people in Harlem. In sum, Dr. Katz argues that there was no probative value to these comments; they were intended to prejudice the jury against him. Consequently, Dr. Katz states the AUSA's comments affected the outcome of the trial. The government contends [**24] that during rebuttal closing argument, it discussed the "moral reasonableness" of finding Dr. Katz guilty of his crimes. In doing so, the AUSA contrasted Dr. Katz's crimes with more classic drug offenses with which the jury might be familiar though the mass media. The government asserts that it sought to remind the jury that Dr. Katz was no less guilty simply because he holds a medical degree and operates out of an office rather than on a street corner.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n5 The AUSA stated the following in his rebuttal closing argument:

There's a war on drugs and the DEA fights it every day. Think about that for a minute with me. It has a history of its own, going all the way back to post World War II, the heroine scourge. And it hit big cities like New York and it rooted in the ghettos, places like Harlem. And think about the history of what heroine did to Harlem in post World War II and then fast forward a decade or so to the 60s and the counterculture movement; sex, drugs, and rock and roll. Tune in, turn on, and drop out. It became the mantra of an entire generation. It was rooted in the Height Ashbury District in San Francisco in the 70s and early 80s in cocaine, powder cocaine. That war was fought in the discotheques and the nightclubs and it reached all the way up to the social elite and the famous and the wealthy. Still, movie actors and rock stars. And then came the 80s and the retardation of cocaine, crack cocaine. And it became a poor man's addiction. And then the 90s with methamphetamine and designer drugs like Ecstacy. There's a crazy logic to it all. They all start out in some exotic locale, the coca fields of Afghanistan for heroine or for cocaine in Brazil--I'm sorry. The poppy fields in Afghanistan for heroine. Mexican superlabs for the methamphetamine that makes it across the border. The tropics of the world for the world's strongest and most potent marijuana. And it all comes to America through some port city. It's Miami, it's New York, it's L.A., it's San Francisco or it sneaks across the border across the Rio Grande and they make it to America. And from there, from those port cities, it hopscotches its way across the United States to the big cities, to the medium cities, to the small towns. And that war is fought on a daily basis by DEA special agents. And it's probably easy to be a member of that chain somewhere down the line where either the farmer in the poppy field or the cartel leader in Brazil or the smuggler that gets it into the United States or the mule that transports it to the Midwest or

the distributor on the street corner who sells it. Because no one along that chain has to see the entire picture in carnage that's left behind. No one has to stand face-to-face with that.

[Dr. Katz objected at this point; the district court overruled the objection, but instructed the government to "get back on track."]

But what do we have here? What do we have here? This man is different than the war on drugs you're familiar with from TV. He is licensed, his is educated, he is trained, and he is experienced. And for all of that he is trusted by all of us who are not those things. He is doctor. But when Mike Otten, Dawn Molkenbur, Cindy Scott, Mr. And Mrs. Marlow, Charles Beck, Dan Seay, the Ashers, Bill Bradley, Danny Turman, and all four of the Bowen family walk into the office and need something from the doctor, they tell him what they want, he does not tell them what they need. When you tell the doctor what you want and he gives it to you without questions asked, that's Doctor Feel Good, that's not Dr. Katz. This doctor is no more than a drug dealer. He has an office instead of a street corner. Do we put a DEA diversion agent in every doctor's office now? We can't. How do we fight convenience doctors, drug dealers? You do. It's not good faith. There is not one scintilla of evidence that this man was acting in good faith. It's more of this. I don't care, here's your prescription . . . .

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

[**25] "The trial court has broad discretion in controlling the direction of opening statements and closing arguments, 'and this court will not reverse absent a showing of abuse of discretion.'" United States v. Conrad, *320 F.3d 851, 855* (8th Cir. 2003) (quoting United States v. Johnson, 968 F.2d 768, 769 (8th Cir. 1992)). "On appeal, we review the facts of each case in order to determine if the prosecutor's remarks unduly prejudiced the defendant's opportunity for a fair trial. We will reverse the conviction if we conclude the jury's verdict could reasonably have been affected by the prosecutor's improper comments." Id. (internal citations omitted).

This court has established a two-part test for reversible prosecutorial misconduct: (1) the prosecutor's remarks or conduct must have been improper, and (2) such remarks or conduct must have prejudicially affected the defendant's substantial rights so as to deprive the defendant of a fair trial. We employ the following three factors to determine the prejudicial effect of prosecutorial misconduct: (1) the cumulative effect of such misconduct; (2) the strength of the properly admitted evidence of [**26] the defendant's guilt; and (3) the curative actions taken by the court.

Id. (internal quotations and citations omitted).

We agree with Dr. Katz that the comments made by the AUSA during his rebuttal closing argument were improper. [*1034] The comments "had little or no probative value on any issue at trial;" they "did not relate to an element of the offense nor did the comments aid the fact finder." Id. However, we cannot say that the AUSA's remarks prejudicially affected Dr. Katz's substantial rights so as to deprive him of a fair trial. First, examining the cumulative effect of the misconduct, we note that the AUSA's comments were limited to one phase of the trial--closing arguments. Cf. Conrad, 320 F.3d at 855-56 (finding that the prosecutor made improper comments throughout the trial, including in his opening statement, during direct examination of witnesses, and during his closing argument). Second, the evidence presented against Dr. Katz was substantial in that it included the testimony of 15 patient/witnesses, regarding more than 400 prescriptions. Lastly, from a review of the record, it appears that Dr. Katz only made one objection during the government's [**27] rebuttal closing argument and did not request a curative instruction. The district court overruled Dr. Katz's objection, but warned the AUSA to "get back on track." Thus, in light of the abundant evidence presented supporting the jury's guilty verdict and the fact that the improper comments were limited to the rebuttal closing argument, we find that the government's improper comments made during rebuttal closing argument did not prejudicially

affect Dr. Katz's substantial rights so as to deprive him of a fair trial.

F. Mistrial

Finally, Dr. Katz contends that the district court erred in failing to grant a mistrial after a government witness, Chad Asher, twice disclosed to the jury that Dr. Katz had been disciplined by state licensing authorities, which violated the district court's pretrial order. Dr. Katz argues that disclosure of the disciplinary action against him confused the jury and encouraged it to convict him based on this irrelevant and inadmissible fact. Dr. Katz declined a curative instruction, deciding not to call more attention to the impermissible testimony. Dr. Katz argues that the jury would likely view testimony of his professional discipline as highly probative, [**28] confirming in their minds that the state authorities also believed that he behaved improperly. For those reasons, Dr. Katz asks this court to find that the denial of a mistrial was an abuse of discretion.

The government states that the district court characterized Asher's comments as an "isolated incident." The government submits that Asher was one of 17 witnesses who testified over a period of 5 days, and the objectionable testimony came in the form of two brief comments, which were quickly interrupted and not exploited in any way. Thus, the government maintains that it is highly unlikely that these two comments from Chad Asher had any significant impact on the jury.

"The standard of review of a denial of a motion for a mistrial is abuse of discretion. The prejudicial effect of any improper testimony is determined by examining the context of the error and the strength of the evidence of the defendant's guilt." United States v. Hollins, 432 F.3d 809, 812 (8th Cir. 2005) (internal citation omitted). "The district court is in a far better position to measure the effect of an improper [answer] on the jury than an appellate court which reviews only the cold record. [**29] " Id. (internal quotations and

brackets omitted). The two objectionable portions of Chad Asher's testimony are as follows:

> A. I called him and told him I had an extremely bad tooth ache, and -
>
> Q. Let me stop you right there. Was that true the first time?
>
> A. Yeah, it was.
>
> Q. And what happened?
>
> [*1035] A. I recall at that time he was having - - he was in trouble - - his license - -
>
> Q. I don't want to ask you about any of that, just when you went to the office what happened?
>
> * * *
>
> Q. Did it ever work?
>
> A. There were a few instances where I did see him like after 12 days instead of 14. It was supposed to be 14, but then I think he ran into a little trouble with his license - -
>
> Q. Mr. Asher, wait, wait, wait. I just want to talk about the times that you saw him before the 14 days expired. Did you have a conversation with Dr. Katz about that, did he realize you were there early?

Considering the numerous witnesses called to testify in this matter and the amount of evidence presented against Dr. Katz, we conclude these two unsolicited statements in possible violation of the district court's pretrial order were not sufficient to warrant the [**30] drastic remedy of mistrial. United States v. Cole, 380 F.3d 422, 427 (8th Cir. 2004) ("In the face of the strong evidence and wide array of testimony against Cole, one objectionable statement by a prosecution witness was not sufficient to create prejudicial error."). Therefore, the district court did not abuse its discretion in denying Dr. Katz's motion for a mistrial.

III. Conclusion

For those reasons stated above, Dr. Katz's conviction is affirmed.

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APPENDIX B

JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI ENTERED 6-30-05

ENTERED JUNE 30, 2005

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURY
JUDGEMENT IN A CRIMINAL CASE

UNITED STATES OF AMERICA,
v.
HARRY MEYER KATZ

Case Number: S2-4:04CR324DJS
USM Number: 31100-044
Defendant's Attorney: Barry Short and Evan Reid

THE DEFENDANT:
[ ] pleaded guilty to count(s) _____
[] pleaded nolo contendere to count(s)_____ which was accepted by the court.
[x] was found guilty on count(s) 1-6, 22-31, 32, 33-43, 44-95, 96-148, 149, 150-160, and 162-192 of the second superseding indictment on March 15, 2005 after a plea of not guilty.

Title & Section: 21 U.S.C. §841(a)(1) and §846
Nature of Offense: attempting to distribute alprazolam outside the scope of professional practice and not for a legitimate medical purpose
Date Offense Concluded: see page 4
Count Number(s): 1-5
Title & Section: 21 U.S.C. §841(a)(1) and §846
Nature of Offense: attempting to distribute diazepam outside the scope of professional practice and not for a legitimate medical purpose
Date Offense Concluded: see page 4
Count Number(s): 6
Title & Section: 21 U.S.C. §841(a)(1) and §846

Nature of Offense: distribution alprazolam outside the scope of professional practice and not for a legitimate medical purpose
Date Offense Concluded: see page 4
Count Number(s): 33, 34, 36, 38, 40, 42, 188, 190 and 192

The defendant is sentenced as provided in pages 2 through 9 of this judgement. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[] The defendant has been found not guilty on count(s)_____

[] Count(s)_____dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

Date of imposition of Judgement: June 30, 2005

Signature of Judge
/SS/_____.
Name and Title of Judge:
DONALD J. STOHR
UNITED STATES DISTRICT JUDGE
Date signed: June 30, 2005

ADDITIONAL COUNTS OF CONVICTION

Title & Section: 21 U.S.C. §841(a)(1)

Nature of Offense: Distribution of lorazepam outside the scope of professional practice and not for a legitimate medical purpose
Date Offense Concluded: see page 4
Count Number(s): 22, 24, 26, 28 and 30
Title & Section: 21 U.S.C. §841(a)(1)
Nature of Offense: Distribution of propoxyphene outside the scope of professional practice and not for a legitimate medical purpose
Date Offense Concluded: see page 4
Count Number(s): 23, 25, 27, 29, 31, 35, 37, 39, 41, 43, 97, 99, 101, 103, 105
Title & Section: 21 U.S.C. §841(a)(1)
Nature of Offense: " " " " "
Date Offense Concluded: see page 4
Count Number(s): 107, 109, 110, 113, 115, 117, 119, 121, 123, 125, 127, 129
Nature of Offense: " " " " "
Date Offense Concluded: see page 4
Count Number(s): 131, 133, 135, 137, 139, 141 189 and 191
Title & Section: 21 U.S.C. §841(a)(1)
Nature of Offense: Distribution of codeine with acetaminophen outside the scope of professional practice and not for a legitimate medical purpose
Date Offense Concluded: see page 4
Count Number(s): 32
Title & Section: 21 U.S.C. §841(a)(1)
Nature of Offense: Distribution of hydrocodone outside the scope of professional practice and not for a legitimate medical purpose
Date Offense Concluded: see page 4
Count Number(s): 44-95 and 149
Title & Section: 21 U.S.C. §841(a)(1)
Nature of Offense: Distribution of diazepam outside the scope of professional practice and not for a legitimate medical purpose

Date Offense Concluded: see page 4
Count Number(s): 96, 98, 100, 102, 104, 106, 108, 111, 112, 114, 116, 118, 120
Title & Section: 21 U.S.C. §841(a)(1)
Nature of Offense: " " " " "
Date Offense Concluded: see page 4
Count Number(s): 122, 124, 126, 128, 130, 132, 134, 136, 138, 140, 142-148
Title & Section: 21 U.S.C. §841(a)(1)
Nature of Offense: " " " " "
Date Offense Concluded: see page 4
Count Number(s): 150-160, and 162-187

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 16 month(s).

This term consists of a term of 16 months on each of Count 1 through 6~ 22 through 31,33 through 43, 96 through 148, 150 through 160, 162 through 192, and a term of 16 months on Counts 32, 44 through 95, and 149, ail such terms to be served concurrently.

[x] The Court makes the following recommendations to the Bureau of Prisons:
To the extent that space is available and that the defendant is qualified, it is recommended that he be allowed to serve his term of incarceration at FPC Eglin Air Force Base in Florida

[] The defendant is remanded to the custody of the United States Marshal.
[] The defendant shall surrender to the United States Marshal for this district
[] _____ on _____
[] as notified by the United States Marshal.

[x] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

[] by 2 p.m. on _____

[x] as notified by the United States Marshal.

[] as notified by the Probation or Pretrial Services Office.

MARSHALS RETURN MADE ON SEPARATE PAGE

ADDITIONAL IMPRISONMENT TERMS

DATES OFFENSES OCCURRED:

Count 1 - On or about 8/31/00
Count 2 - On or about 9/14/00
Count 3 - On or about 10/31/00
Count 4 - On or about 11/20/00
Count 5 - On or about 1/19/01
Count 6 - On or about 1/26/01
Count 22 - On or about 12/15/00
Count 23 - On or about 12/15/00
Count 24 - On or about 1/8/01
Count 25 - On or 0bout 1/82/01
Count 26 - On or about 1/26/01
Count 27 - On or about 1/26/01
Count 28 - On or about 2/12/01
Count 29 - On or about 2/12/01
Count 30 - On or about 3/5/01
Count 31 - On or about 3/5/01
Count 32 - On or about 1/10/01
Count 33 - On or about 1/10/01
Count 34 - On or about 1/31/01
Count 35 - On or about 1/31/01
Count 36 - On or about 2/9/01
Count 37 - On er about 2/9/01

Count 38 - On or about 2/27/01
Count 39 - On or about 2/27/01
Count 40 - On or about 4/8/01
Count 41 - On or about 4/8/01
Count 42 - On or about 4/23/01
Count 43 - On or about 4/23/01
Count 44 - On or about 12/18/99
Count 45 - On or about 12/27/99
Count 46 - On or about 1/2/00
Count 47 - On or about 1/9/01
Count 48 - On or about 1/15/00
Count 49 - On or about 1/22/00
Count 50 - On or about 1/30/00
Count 51 - On or about 2/5/00
Count 52 - On or about 2/29/00
Count 53 - On or about 3/22/00
Count 54 - On or about 3/30/00
Count 55 - On or about 4/11/00
Count 56 - On or about 4/25/00
Count 57 - On or about 5/2/00
Count 58 - On or about 5/8/00
Count 59 - On or about 5/16/00
Count 60 - On or about 5/22/00
Count 61 - On or about 5/28/00
Count 62 - On or about 6/3/00
Count 63 - On or about 6/9/00
Count 64 - On or about 6/25/00
Count 65 - On or about 7/15/00
Count 66 - On or about 8/6/00
Count 67 - On or about 9/17/00
Count 68 - On or about 12/15/00
Count 69 - On or about 12/26/00
Count 70 - On or about 1/5/01
Count 71 - On or about 1/10/01
Count 72 - On or about 1/19/01
Count 79 - On or about 1/24/01
Count 74 - On or about 1/30/01

Count 75 - On or about 2/5/01
Count 76 - On or about 2/10/01
Count 77 - On or about 2/16/01
Count 78 - On or about 2/21/01
Count 79 - On or about 2/27/01
Count 80 - On or about 3/4/01
Count 81 - On or about 3/9/01
Count 82 - On or about 3/17/01
Count 83 - On or about 4/1/01
Count 84 - On or about 4/6/01
Count 85 - On or about 4/14/01
Count 86 - On or about 4/19/01
Count 87 - On or about 4/25/01
Count 88 - On or about 5/6/01
Count 89 - On or about 5/22/01
Count 90 - On or about 5/27/01
Count 91 - On or about 6/10/01
Count 92 - On or about 6/22/01
Count 93 - On or about 7/3/01
Count 94 - On or about 7/8/01
Count 95 - On or about 8/9/01
Count 96 - On or about 1/22/01
Count 97 - On or about 1/22/01
Count 98 - On or about 2/5/01
Count 99 - On or about 2/5/01
Count 100 - On or about 2/19/01
Count 101 - On or about 2/19/01
Count 102 - On or about 3/5/01
Count 103 - On or about 3/5/01
Count 104 - On or about 5/5/01
Count 105 - On or about 5/5/01
Count 106 - On or about 5/22/01
Count 107 - On or about 5/22/01
Count 108 - On or about 6/4/01
Count 109 - On or about 6/4/01
Count 110 - On or about 6/14/01
Count 111 - On or about 6/26/01

Count 112 - On or about 7/10/01
Count 113 - On or about 7/10/01
Count 114 – On or about 7/24/01
Count 115 - On or about 7/24/01
Count 116 - On or about 1/3/01
Count 117 - On or about 1/3/01
Count 118 - On or about 1/16/01
Count 119 - On or about 1/16/01
Count 120 - On or about 1/30/01
Count 121 - On or about 1/30/01
Count 122 - On or about 2/13/01
Count 123 - On or about 2/13/01
Count 124 - On or about 2/27/01
Count 125 - On or about 2/27/01
Count 126 - On or about 3/13/01
Count 127 - On or about 3/13/01
Count 128 - On or about 5/1/01
Count 129 - On or about 511/01
Count 130 - On or about 5/16/01
Count 131 - On or about 5/16/01
Count 132 - On or about 5/30/01
Count 133 - On or about 5/30/01
Count 104 - On or about 6/11/01
Count 135 - On or about 6/11/01
Count 136 - On or about 7/5/01
Count 137 - On or about 7/5/01
Count 138 - On or about 7/31/01
Count 139 - On or about 7/31/01
Count 140 - On or about 8/13/01
Count 141 - On or about 8/13/01
Count 142 - On or about 1/6/01
Count 143 - On or about 2/16/01
Count 144 - On or about 3/23/01
Count 145 - On or about 5/14/01
Count 146 - On or about 6/2/01
Count 147 - On or about 6/21/01
Count 148 - On or about 8/9/01

Count 149 - On or about 1/5/01
Count 150 - On or about 1/15/01
Count 151 - On or about 2/9/01
Count 152 - On or about 3/8/01
Count 153 - On or about 4/9/01
Count 154 - On or about 5/11/01
Count 155 - On or about 6f22/01
Count 156 - On or about 7/9/01
Count 157 - On or about 7/24/01
Count 158 - On or about 8/7/01
Count 159 - On or about 1/16/01
Count t60 - On or about 2/21/01
Count 162 - On or about 4/29/01
Count 163 - On or about 8/1/01
Count 164 - On or about 1/4/00
Count 165 - On or about 1/18/00
Count 166 - On or about 2/1/00
Count 167 - On or about 2/15/00
Count 168 - On or about 3/8/00
Count 169 - On or about 3/23/00
Count 170 - On or about 4/5/00
Count 171 - On or about 4/19/00
Count 172 - On or about 5/2/00
Count 173 - On or about 5/12/00
Count 174 - On or about 5/31/00
Count 175 - On or about 6/13/00
Count 176 - On or about 6/24/00
Count 177 - On or about 7/12/00
Count 178 - On or about 7/27/00
Count 179 - On or about 8/10/00
Count 180 - On or about 8/25/00
Count 181 - On or about 9/12/00
Count 182 - On or about 10/16/00
Count 183 - On or about 11/12/00
Count 184 - On or about 12/3/00
Count [85 - On or about 12/17/00
Count 186 - On or about 5/30/01

Count 187 - On or about 6/13/01
Count 188 - On or about 7/11/01
Count 189 - On or about 7/11/01
Count 190 - On or about 7/24/01
Count 191 - On or about 7/24/01
Count 192 - On or about 8/33/01

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 2 year(s).
This term consists of a term of I year on each of Counts 1-6, 22-31, 33-43, 96-148, 150-160, 162-192, and 2 years on each of Counts 32, 44-95, and 149, all such terms to run concurrently.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.
The defendant shall not commit another federal, state, or local crime.
The defendant shall not illegally possess a controlled substance.
The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.
[x] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable)
[x] The defendant shall not possess a firearm as defined in 18 U.S.C.§ 921. (Check, if applicable)
The defendant shall coapera~ in the collectinn of DNA as directed by the probation officer, (Check. it'applicable)
[] The defendant shall register with the state sex offender registration agency in the state where the defendant resides,

works, or is a student, as directed by the probation officer. (Check, if applicable.)
[] The Defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shah be a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment
The defendant shall comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the Court or probation officer;
2) the defendant shah report to the probation officer and shall submit a truthful and complete wrr['ten report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or ether acceptable reasons;
6) the defendant shall notify the probation officer ten days prior to any change m residence or employment;
7) the defendant shall refrain from excessive use of alcohol;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person

convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a taw enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

ADDITIONAL SUPERVISED RELEASE TERMS

1. The defendant shall participate in a mental health program approved by the United States Probation Office. The defendant shall pay for the costs associated with the services provided based on a co-payment fee established by the United States Probation Office. Co-payments shall never exceed the total cost of services provided.

2. The defendant shall provide the United States Probation Office access to any requested financial information.

3. The defendant shall be prohibited from incurring new credit charges or opening additional lines of credit without the approval of the United States Probation Office so long as there is a balance on the Court-imposed financial obligation.

4. The defendant shall pay the fine as ordered by the Court,

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments on sheet 6.

Totals: Assessment: $17,600.00
Fine: $75,000.00
Restitution:

[] The determination of restitution is deferred until _____ will be entered after such a determination. *An Amended Judgment in a Criminal Case (AO 245C).*

[] The defendant shall make restitution, payable through the Clerk of Court, to the following payees in the amounts listed below.

If the defendant makes a partial payment each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below. However, pursuant of 18 U.S.C. 3664(i) all nonfederal victims must be paid before the United States is paid.

Name of payee	Total Loss	Restitution Ordered	Priority or Percentage
Totals: _____			

[] Restitution amount ordered pursuant to plea agreement __

[] The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment pursuant to 18 U,S.C, § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

[] The court determined that the defendant does not have the ability to pay interest and it is ordered that:

The interest requirement is waived for the. [] fine and/or [] restitution.
The interest requirement for the [] fine [] restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994 but before April 23, 1996.

ADDITIONAL TERMS FOR CRIMINAL MONETARY PENALTIES

The defendant shall pay to the United States a special assessment of $100 on each of Counts 1-6, 22-160, and 162-192, for a total of $17,600, that shall be due immediately.

The defendant shall pay to the United States a fine of $75,000 which is due in full within 30 days of this judgment. Payment of the fine is to be made to the Clerk of the Court. The defendant shall notify the U.S. Attorney for this district within 30 days of any change of mailing or residence address that occurs while any portion of the sum remains unpaid.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:
A [] Lump sum payment of _____ due immediately, balance due

[] not later than _____, or
[] in accordance with [] C, [] D, or [] E below; or [] F below; or

B [] Payment to begin immediately maybe combined with [] C, [] D, or [] E below; or [] F below; or

C [] Payment in _____ (e.g., equal, weekly, monthly, quarterly) installments of _____ over a period of _____. (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D []Payment in _____ (e.g., equal, weekly, monthly, quarterly) installments of _____ over a period of _____. (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E [] Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after Release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F [x] Special instructions regarding the payment of criminal monetary penalties:

See page 8 for further instructions.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prisons Inmate Financial Responsibility Program are made to the clerk of the court.

The defendant will receive credit for all payments previously made reward any criminal monetary penalties imposed.

[] Joint and Several

Defendant and Co-defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

[] The defendant shall pay the cost of prosecution.

[] The defendant shall pay the following court cost(s):

[] The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment; (2) restitution principal, (3) restitution interest, (4) fine principal, (5)fine interest (6) community restitution,(7) penalties, and (g) costs, including cost of prosecution and court.

APPENDIX C

ORDER OF THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT DATED 6-15-06

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 05-2940

United States of America,
Appellee,

vs.

Harry Meyer Katz,
Appellant.

Order Denying Petition for Rehearing and for Rehearing En Banc.

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Gruender took no part in the consideration or decision of this matter(5128-010199)

June 15, 2006

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX D

WILLFUL BLINDNESS INSTRUCTION
DATED 3-14-05

Instruction No. 17: You may find that the defendant Harry Meyer Katz acted knowingly if you find beyond a reasonable doubt that defendant Katz was aware of a high probability that he caused to be dispensed controlled substances outside the scope of professional medical practice and not for a legitimate medical purpose and that he deliberately avoided learning the truth. The element of knowledge may be inferred if the defendant deliberately closed his eyes to what would otherwise have been obvious to him. You may not find that defendant Katz acted knowingly, however, if you find that the defendant actually believed that he acted within the scope of professional practice or actually believed that there existed a legitimate medical purpose for the prescription at issue. A showing of negligence, mistake, or carelessness is not sufficient to support a finding of knowledge. (Katz Transcript Trial 3-14-05, pages 17-18)